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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 679

MARKET STREET RAILWAY COMPANY
(a corporation),
Petitioner,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

CYRIL APPEL,
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PRINAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No.

MARKET STREET RAILWAY COMPANY (a corporation),
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RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Market Street Railway Company, a corporation, by its attorneys, respectfully petitions this Court to

grant a writ of certiorari to review the final order and decision of the Supreme Court of the State of California entered in the above entitled cause on June 18, 1946, after the Supreme Court of the United States had affirmed the original judgment of the Supreme Court of the State of California (R. 119-147) in said cause. (324 U. S. 548; rehearing denied 324 U. S. 890.)

OPINIONS BELOW.

The opinion of the Supreme Court of the State of California (R. 171-182) and the dissenting opinion of Mr. Justice Edmonds, concurred in by Mr. Justice Schauer (R. 183-188), are reported in 28 Advance California Reports 387, 171 Pac. (2d) 875.

JURISDICTION.

The judgment sought to be reviewed is an original order made by the Court below, which is the highest Court of the State of California. It was made and entered June 18, 1946. (R. 171-188.) Petitioner duly filed its Petition for Rehearing as to said order on July 3, 1946 (R. 188), but the same was denied without opinion on July 15, 1946 (R. 212), and said order is final.

On September 23, 1946, by order of Mr. Justice Rutledge the time within which the petition for certiorari herein might be filed was extended for 30 days from October 15, 1946. (R. 217.)

Jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

The Federal right, privilege or immunity claimed is based upon Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the final order and decision of the State Court as to which review is here sought, if enforced, will deprive petitioner of its property without due process of law.

The Federal question was set up and claimed in the "Petition of Market Street Railway Company for Order Superseding or Modifying Order Directing Payment of Impounded Funds", dated May 9, 1945. (R. 158, 159.) The Federal question was again raised in petitioner's "Final Report and Supplemental Petition", dated January 8, 1946. (R. 167, 168-169.) The same question was also asserted and set up in petitioner's "Final Brief in Support of Petition and Supplemental Petition", mentioned above, and in opposition to the claims of the State of California and City and County of San Francisco.[1] Petitioner set up the same question for the last time in its petition for rehearing of the order of said Supreme Court as to which review is here sought. (R. 188, 189-190, 191-192, 200-201, 210.)

[1]This Final Brief was omitted from the printed record herein by the Clerk, but is a part of the record certified by the Clerk of the California Supreme Court.

The Federal question involves the right of the California Supreme Court to make the order set forth below.[2]

Petitioner has contended throughout this proceeding that it was, and is, the legal owner of all fares collected by it pending final determination of the review proceedings, subject to the legal duty to refund any amount in excess of the rate fixed by the order of the Railroad Commission *to the persons who paid the same,* if said order be sustained. Petitioner has further contended that after the time fixed by the State Court within which refunds might be claimed had expired, it was, and is, the owner of the unclaimed excess charges, free from the claims of any person, and that the Courts of California may not arbitrarily take such fund, or require petitioner to pay over the amount thereof to the City and County of San Francisco without violating the due process clause of the 14th Amendment.

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[2] "It is ordered that the order of this court dated March 8, 1944, staying execution of the order of the Railroad Commission pending final determination of the review proceeding, be and the same is hereby modified by substituting and naming the City and County of San Francisco as the recipient of the unclaimed portion of the excess fare accumulated during the pendency of the review proceeding."

"It is further ordered that upon receipt by the Clerk of this court of a cashier's or a certified check in the sum of $688,751.58 (representing the sum of $693,780.51, the amount of the unclaimed excess fares, less the sum of $5,028.93, the company's expense in making refunds), payable to the City and County of San Francisco, the Clerk is directed to deliver to Market Street Railway Company's duly authorized representative the securities deposited by the company, pursuant to the order of March 8, 1944, and to sign and accept mutual acknowledgements evidencing the completed transaction. Thereupon the Market Street Railway Company shall be deemed discharged from further liability under the stay order and the surety on its bond of $100,000.00 shall stand exonerated" (R. 182).

The jurisdiction of this Court to review the decision and final order of the Court below by certiorari under Section 237 (b) of the Judicial Code, as amended, is believed to be fully sustained by the following decisions of this Court:

Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226;
Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403;
Missouri Pac. R. Co. v. Nebraska, 217 U. S. 196;
Great Northern R. Co. v. Cahill, 253 U. S. 71;
Scott v. McNeal, 154 U. S. 34.

The Supreme Court of the State of California in its opinion did not in terms specifically decide the federal question presented by petitioner herein, but such actual decision or consideration of the claim of violation of the 14th Amendment to the United States Constitution is not required. It has been held repeatedly that it is sufficient that the federal question was fairly presented by the record, was necessary to a determination of the cause, and that no adequate nonfederal ground of decision appears.[3]

Where a federal claim is timely and properly asserted before a State Court, the failure of the State Court to pass upon the federal question thus asserted is not conclusive upon the Supreme Court, but the latter will proceed to determine whether there is any non-federal ground of decision which independently and adequately supports the judgment. *Chicago, Burlington & Quincy Ry. v. Illinois ex rel. Drainage Com'rs*, 200 U. S. 561, 580, 581; *West*

[3] *Chapman v. Goodnow's Adm'r*, 123 U.S. 540, 548; *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 236; *Chicago Life Ins. Co. v. Needles*, 113 U.S. 574, 579; *Erie R. Co. v. Purdy*, 185 U.S. 148, 154; *Roby v. Colehour*, 146 U.S. 153, 159; *Dewey v. City of Des Moines*, 173 U.S. 193, 199; *Dorchy v. Kansas*, 272 U.S. 303, 308, 309.

Chicago St. Railroad Co. v. Illinois ex rel. City of Chicago, 201 U. S. 506, 519, 520; *Wood v. Chesborough,* 228 U. S. 672, 676-680; *Davis v. Wechsler,* 263 U. S. 22, 24.

Federal rights are denied as well by a refusal of the State Court to expressly rule upon a claim of right under the Federal Constitution, as by an erroneous decision in respect to such questions.

Lawrence v. State Tax Commission of Mississippi, 286 U. S. 276, 282.

Here the Court below in its majority opinion did not even mention the fact that your petitioner had timely invoked the protection of the Fourteenth Amendment against the claims of the City and County of San Francisco.

However, in the dissenting opinion of Mr. Justice Edmonds (R. 183-188) the constitutional right of your petitioner not to be deprived of its property is recognized when he says:

> "In my opinion, the Market Street Railway Company is entitled to retain the accumulated fund representing excess fares paid by its patrons. It is said that because of the provisions of the stay order the carrier may not successfully maintain a claim of legal ownership of the money now in its possession. *But by such an order, this court could not confiscate for the public property which the railroad might thereafter lawfully acquire, nor prevent passengers from abandoning to the corporation amounts paid in excess of the reduced rate during the time the order of the railroad commission was held in abeyance.*"

No tenable independent non-federal ground of decision appears in the opinion of the State Court.

The only persons who sustained any injury or damage by reason of the stay order which permitted your petitioner to charge a fare of seven cents instead of six cents during the period while the order of the California Railroad Commission reducing petitioner's fare was under review by the California Supreme Court and this Court were the persons who paid the extra penny per ride. Those persons, after said order of the Railroad Commission was upheld, were afforded an opportunity to retrieve such excess charges without cost or expense during a period of six months under a procedure devised by the California Supreme Court. After the expiration of such period their right to claim refunds was barred by the Court's order.

The street railway company and its passengers were the only parties pecuniarily interested in any degree in this refunding operation, or in the so-called "impounded fund" represented by your petitioner's securities deposited with the Clerk of the California Supreme Court "as further security to enforce prompt payment by petitioner of all damages caused by the delay in the enforcement of said decision and order of the Commission and of all moneys any person may be compelled to pay petitioner for transportation pending review in excess of the charges fixed by said decision and order of the Railroad Commission, and of all moneys payable to the State of California, in the event said decision and order are affirmed."

It is conceded in the opinion of the Supreme Court of California that at the time in question the California Public Utilities Act contained no provision either requiring, or authorizing, the Supreme Court to order a public utility to pay over to the State of California any unclaimed excess charges in its possession or to award any impounded funds to the State *or to any other person or corporation unless they had paid an excess fare.*

The California Supreme Court in its opinion does not claim to act under any legislative authority, but claims the power to award the unclaimed excess charges to the City and County of San Francisco upon the following theory:

> "The excess fares are impounded funds in the custody of the court, although they are represented by the securities on deposit. * * * This Court has the power and the responsibility of protecting the fund and of disposing of it in accordance with the applicable principle of law and equity *for the protection of the litigants and the public whose interests are affected by the final disposition thereof.* The court is said to be free, in the discharge of that duty and responsibility, to use broad discretion in the exercise of its powers so as to avoid an unlawful or unjust result. * * *."

> "Pursuant to its retained jurisdiction and *its inherent power* to dispose of the impounded moneys in accordance with the foregoing principles, this court will consider the merits of the claims of each of the parties and dispose of the fund in accordance with the law and the equities thus appearing."

It will be noted in the above excerpt that the Supreme Court claims it has the power of disposing of the fund *"for the protection of the litigants and the public whose interests are affected by the final disposition thereof."*

Who were the litigants before the Supreme Court of California? They were petitioner and the California Railroad Commission. It is significant that neither the California Railroad Commission nor its attorneys took any part in the proceedings after your petitioner had completed the refunding operation and had filed its final report. Its duty to the public was then completed; it had no interest in the unclaimed fund.

What is meant by "the public whose interests are affected by the final disposition of the fund"? The only members of the public who had any interest in the fund were those persons who had paid a fare in excess of that prescribed by the Railroad Commission. All persons who presented claims were paid. Those persons, who were entitled to a refund but did not present their claims within the time allowed by the Supreme Court, after the time had expired, no longer had any interest in the fund because their causes of action were barred. *Hence, it appears that no members of the public had any interest in the fund to be affected by the disposition thereof.*

Are such transcendental "inherent powers" adequate to sustain the final order of the Court, and to justify the taking of petitioner's property without due process of law in complete disregard of the 14th Amendment to the Constitution of the United States?

Is a ground of such evanescent character such that it may meet the requirements of this Court as set forth in its decisions as to what is adequate to support the judgment, that is:

1. Is it broad enough to sustain the judgment?

2. Is it independent, or is it so interwoven with the federal question as to be incapable of separate treatment and determination?

3. Is it fair, tenable, and substantial, or is it unsubstantial and illusory?

4. Is it well founded, or is it so certainly unfounded that it may be regarded as *essentially arbitrary* or a mere device to prevent a review of the decision upon the federal question?

The Supreme Court of California in its opinion points to no *law*, either statutory or common law, in support of its order, but in order to deprive petitioner of its property relies upon its alleged "inherent powers", whatever they may be.

It is respectfully submitted that the decision of the Supreme Court of California is not based upon a non-federal ground. If, however, this Court considers the decision to be based upon the ground that the State Court has the inherent power to take petitioner's property and to award the same to whomsoever the Court desires to make the object of its beneficence, then your petitioner contends that such ground, if it be considered non-federal in character, is so interwoven with the federal question of the impairment of the constitutional rights of petitioner

as not to be an *independent* ground and of *sufficient breadth* to sustain the decision.

If it be urged that the decision of the State Court rests upon a non-federal ground, it is incumbent upon this Court to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether an asserted non-federal ground independently and adequately supports the judgment. *Enterprise Irrigation District v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164; *Union Pacific R. Co. v. Public Service Comm.*, 248 U.S. 67, 69, 70; *Ward v. Love County*, 253 U.S. 17, 22; *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540; *Abie State Bank v. Bryan*, 282 U.S. 765.

Where the non-federal ground is so interwoven with a valid federal ground as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, the jurisdiction of this Court to review by certiorari is plain. *Enterprise Irrig. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157; *Creswill v. Grand Lodge, K. P.*, 225 U. S. 246, 261.

QUESTIONS PRESENTED.

The questions presented for the determination of this Court are:

1. Is a street railway company the legal owner of the sum of money collected by it from a passenger as the consideration for transportation on its cars?

2. If a state railroad commission issues an order requiring a street railway company to reduce its established fare from 7 cents to 6 cents, but a State Court, acting under legislative authority therefor, makes an order suspending the operation of such commission order, is not the company the legal owner of the entire amount of all fares collected by it during the time the operation of such order is suspended or stayed?

3. After the collection by a carrier of fares in excess of that fixed in an order of a state railroad commission, the operative effect of which order was suspended by a Court pending review, and after such commission order is sustained, does not a cause of action against the carrier then arise in favor of each passenger for the amount of the excess fare paid by him, and is not the relationship existing between the carrier and such passengers that of debtor and creditor?

4. May not the owner of a cause of action to recover excess charges paid to a public utility abandon his property therein to such utility, or, by forbearance to claim such excess charges within the period allowed for making claim therefor, waive his claim?

5. If the passengers of a common carrier fail to assert their claims against such carrier for amounts paid by them in excess of a rate fixed by a regulatory body, may a Court require the carrier to pay over to a municipal corporation which had paid no part of such excess charges, and is a stranger to the proceedings, the entire balance remaining, without taking the property of the carrier without due process of law in violation of Section 1 of

the 14th Amendment to the Constitution of the United States?

6. After the time has expired for persons to claim refunds of excess charges paid by them to a public utility, if a Court orders the utility to pay over the amount of all unclaimed excess charges to the purchaser of the operative properties of the utility, who had no interest in the properties when the excess charges were collected, and who did not purport to purchase any rights in such excess charges, is not the property of the utility taken without due process of law?

STATUTES INVOLVED.

Sections 67 and 68 of the Public Utilities Act of the State of California as they existed during all of the times herein mentioned are set forth in the Appendix hereto.

STATEMENT OF THE CASE.

The Railroad Commission of the State of California made an order reducing the fare of petitioner from 7 cents to 6 cents. (R. 2.) Petitioner filed a petition for a writ of certiorari to review said order and for a stay pending review with the Supreme Court of the State of California (R. 1-13), and, after the hearing required by Section 68 of the California Public Utilities Act (Appendix hereto), the Court made an order on March 8, 1944 staying and suspending the decision and order of the Commission pending review (R. 115-119), and, as required

by said Act, found that great and irreparable damage would be sustained by petitioner in the event said order and decision were annulled unless a stay be granted. (R. 116.) As required by the stay order, petitioner filed a suspending bond in the sum of $100,000. (R. 119.) Other pertinent terms of the stay order are set forth in the footnote hereto.[4]

A few months later the Commission order was affirmed by the State Court and judgment entered accordingly (R. 119, 147), whereupon your petitioner prosecuted an appeal to this Court and the stay previously granted was

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[4] "Petitioner shall deposit with this Court on the first day of each month during the pendency of this review proceeding, beginning on April 1, 1944, a Certificate of Indebtedness 7/8% issued by the United States Government, of the face amount of $100,000, payable to bearer, to be held by this Court as further security to enforce the prompt payment by petitioner of all damages caused by the delay in the enforcement of said decision and order of the Commission and of all moneys any person may be compelled to pay petitioner for transportation pending review in excess of the charges fixed by said decision and order of the Railroad Commission, and of all moneys payable to the State of California, in the event said decision and order are affirmed." (R. 117.)

"In the event that this court finally affirms said decision and order of the Railroad Commission, and in the further event that the persons entitled to a refund of the excess charges collected by petitioner during this review proceeding do not claim all of such excess charges or moneys within six months after the final decision of this Court, the State shall be entitled to all such excess charges or moneys which petitioner has unsuccessfully attempted to refund, to be paid to it under such terms and conditions as the court may hereafter prescribe.

Acceptance by petitioner of the benefits of the stay hereby ordered shall be deemed an acceptance of and a consent to the terms and conditions prescribed herein.

This court retains jurisdiction to alter, amend, modify or supercede this order, on motion of either party, or on its own motion, as the interests of justice may require." (R. 118-119.)

continued in full force and effect pending said appeal. (R. 148-149.)

On September 29, 1944, petitioner herein sold and transferred all of its operative properties to the City and County of San Francisco. (R. 153.) By the terms of the agreement of sale on said date the City and County assumed all obligations of the ownership and operation of said operative properties. Petitioner surrendered its operating permit and all franchises and licenses, and was relieved from any and all obligations in connection with said properties and was discharged from any and all obligations to City under said operating permit and franchises. (R. 169-170.)

During the time the successive stay orders of the State Court were in effect, petitioner collected from its passengers the total sum of $705,794.96 in excess of the rate ordered by the Commission (R. 167, 168), and in accordance with the terms of the stay order deposited with the Clerk of the California Supreme Court U. S. Certificates of Indebtedness of a face value of $600,000. (R. 213.)

After this Court affirmed the judgment of the California Supreme Court (324 U. S. 548), on April 28, 1945, City and County of San Francisco filed a petition for modification of the stay order of March 8, 1944, and requested the Court to make an order directing that *all sums collected by petitioner in excess of a 6 cent fare* from and after March 1, 1944, be paid to said City and County to be used solely for the purpose of improving service for the street car riders of San Francisco. (R. 153-154.)

Your petitioner thereafter filed a petition (R. 158-162) and affidavit (R. 162-164) wherein it was prayed that the stay order be modified by directing the return to petitioner of funds (actually securities) deposited by it and not paid out in the redemption of refund coupons. By the affidavit it was shown that after setting up a reserve for the refund of excess fares, the Company had sustained a net operating loss of $502,803.78 for the nine months period ending September 30, 1944.

The Supreme Court made an order setting up a procedure to be followed by the Company in making refunds, establishing the time within which claims for refunds might be presented, to-wit, six months after the publication of a notice in four daily papers, and requiring the Company to file a report thereafter as to refunds made and the amount remaining unclaimed. (R. 164-167.) Pursuant to said order petitioner filed its final report and supplemental petition showing full and complete compliance with said order, and prayed that the unclaimed amount remaining in its hands after the expiration of the time fixed for making refunds, to-wit, $693,780.51, be declared to be and to remain the property of petitioner, that all securities deposited with the Clerk be delivered up to petitioner, and its bond exonerated. (R. 167-171.)

After oral argument and the filing of briefs, the California Supreme Court made and filed the order and decision as to which review is here sought and directed your petitioner to pay to the City and County of San Francisco the sum of $688,751.58 as a condition for the release of petitioner's securities and the exoneration of its bond. (R. 171, 182.)

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of the State of California erred:

1. In holding that petitioner was not the legal owner of all moneys collected by it for the transportation of passengers during the time the operation of the order of the California Railroad Commission was suspended by the order of said Court.

2. In holding that petitioner had no legal ownership in the unclaimed excess charges by reason of a condition inserted in the stay order by the Court over the objections of petitioner, which was not required or authorized by Sections 67 and 68 of the California Public Utilities Act, and in holding that petitioner necessarily accepted the conditions of the order by acceptance of the stay.

3. In holding that the situation of the city was changed by the acquisition of the operative properties of petitioner, and that such changed situation justified and required said Court to consider the alleged equities asserted by the city.

4. In granting the petition of the City and County of San Francisco on the ground that it had purchased the operative properties of your petitioner and would be obliged to spend $1,600,000 in making repairs as to which the company was alleged to be in arrears under its franchise at the time of sale, although the evidence is uncontroverted that by the agreement of sale your petitioner was released of and from any and all obligations to City under any operating permit, franchise or license, and such ruling impairs the obligation of said contract.

REASONS FOR GRANTING THE WRIT.

A. The federal questions are substantial.

The Supreme Court of the State of California has by implication decided federal questions of substance not heretofore specifically determined by this Court, and has decided such questions of public importance in a way probably not in accord with decisions of this Court heretofore rendered in analogous cases hereinafter referred to.

The amount involved is substantial, being almost $700,000. The same legal questions here presented are bound to recur and will sooner or later be brought to the attention of this Court in some other cause, unless settled by this Court now. The decision of the State Court is in conflict with the cases set forth in the following paragraphs.

B. The only cases in point are contrary to the decision of the State Court.

Illinois Bell Telephone Co. v. Slattery, 102 Fed. (2d) 58, is directly in point and supports the legal propositions contended for by petitioner. This Court denied a petition for certiorari in the above case (307 U. S. 648).

The *Illinois Bell Telephone Co.* case, in its many phases, has been before this Court on four occasions as stated in the opinion of the Circuit Court of Appeals, Seventh Circuit, the litigation continued from 1923 to 1939, and the unclaimed excess charges remaining in the hands of the telephone company, after the period for making refunds as fixed by the District Court had expired, was $1,688,295.68.

The telephone company filed a petition reciting that the period for making refunds had expired, that it had complied with all former decrees, and prayed for an order discharging it from any further liability for refunds and further adjudging that any sums unrefunded after payment of all proper claims filed on or before June 1, 1937, are and shall remain the property of the plaintiff, Illinois Bell Telephone Company. *Your petitioner in the case at bar did likewise.* (R. 167-171.)

The State of Illinois filed a petition asking that the unrefunded balance be paid over to it as a *trustee* for such subscribers as had not made application for refunds prior to June 1, 1937, which petition was denied by the District Court *because no statute existed authorizing such allowance,* and because the Illinois Commerce Commission had not acted as agent of the subscribers.[5]

The State of Illinois then filed a petition claiming that the unclaimed refunds were ownerless and therefore belonged to the State of Illinois in its sovereign right under a common law principle known as Bona Vacantia. This petition was denied by the District Court, *the telephone company was discharged in full from all liability under the previous decree of the Court, and remained the owner and in possession of the unrefunded and unclaimed balance.* The decree of the District Court was affirmed by the Circuit Court of Appeals, and certiorari was denied by this Court (307 U.S. 648).

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[5]It will be noted in the case at bar that the City and County asked that the *entire amount* of the excess charges be paid to it, not as a trustee or agent of the street car passengers, but to be used by it in the furtherance of its own business enterprise.

The Circuit Court of Appeals held:

1. That the provision in the decree fixing June 1, 1937, as the expiration of the period during which claims might be filed, was a limitation period and that the lapse of time not only barred the remedy, but destroyed the liability of the telephone company in so far as its subscribers were concerned.

2. *That the relationship existing between the telephone company and its subscribers was merely that of debtor and creditor, and that the company held the overcharges as its own property and not as a trustee for its subscribers.*

3. That the claim of the State of Illinois based on the common law principle of Bona Vacantia, which admittedly did not exist by reason of any statutory provision of the State of Illinois, was not well founded for the following reasons:

> "Many reasons are advanced by plaintiff as to why the doctrine is not here applicable. We shall not discuss them all as one good reason is sufficient. Under the state's theory, the only property which could pass to the state was that owned or possessed by the subscribers at the end of the limitation period. The argument of the state, in our opinion, is predicated upon a foundation which is unsound, in that, the subscribers, at the time when the state made claim, were neither in the possession of or the owner, of any property, or right of claim thereto. *Even before the period of limitation expired, they were not in the true sense, owners of the fund, or any part thereof, in the possession of the plaintiff by reason of the overcharges which they had paid. They had only a claim against plaintiff for a refund. As heretofore deter-*

> *mined, a relation of debtor and creditor existed. For those who failed to make claim in apt time, such relation was terminated.*" (Emphasis supplied.)

In *Pacific Gas & Electric Company v. Railroad Commission*, 16 Fed. Supp. 884, a three judge Court enjoined the Railroad Commission from enforcing an order reducing natural gas rates charged by Pacific Gas & Electric Company. On rehearing the Commission called to the attention of the Court the fact that a large sum of money had been impounded in Court by collection of the old rate during the pendency of the case. The Court ordered the impounded fund paid to the Company, saying:

> "This fund was impounded merely to preserve the status quo during the pendency of the action, and was stipulated to, authorized, and required solely because of the well-founded claim that if the consumers did not pay from month to month during the pendency of the action it would be difficult, if not impossible, to collect from them after decision. *As between the Railroad Commission and the public utility, the money so collected belongs to the public utility.*"

In *Northern Union Gas Co. v. Mayer*, 171 Fed. 602, where the Gas Company had deposited in Court certain sums collected by it in excess of a fixed rate for gas, after the disbursement of the major portion of such fund by a Special Master appointed for that purpose, the balance of such fund was turned over to the Gas Company by the Court, subject to the requirement that it continue to make refunds therefrom to its customers *until their claims were barred by the statute of limitations of the State of New York.*

A similar disposition of unclaimed refund deposits was ordered by the same Court in *Standard Gaslight Co. of City of New York v. Mayer*, 171 Fed. 604.

The questions presented on this petition are novel. Apparently no State Court has ever before attempted such an arbitrary seizure and confiscation of the property of an utility on its own motion and without any statutory authority therefor. There is no decision of this Court settling the questions presented by the judgment sought to be reviewed.

The opinion of the Court below was rendered by a divided Court. Five of the Justices of the California Supreme Court disregarded your petitioner's claim that to compel it to pay over the unrefunded excess fares remaining in its possession after the period of limitations for the presentation of claims for refund fixed by said Court had expired, to either the State of California, or to the City and County of San Francisco, would be to take petitioner's property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

The other Justices of the State Supreme Court recognized the constitutional right of your petitioner not to be deprived of its property by the judicial legislation of the majority, and protested against the confiscation of petitioner's property and the gift of the same to a municipal corporation for use in connection with a business conducted by it in its proprietary capacity.

C. Petitioner is the legal owner of all fares collected by it.

When each passenger boarded one of the cars or buses of your petitioner after the effective date of the order of the California Railroad Commission and dropped seven cents in the fare box, that money became the property of petitioner and was exacted from each passenger as the price for transportation. It is true that one cent out of each seven cents paid was in excess of the amount authorized to be charged by the order of the Railroad Commission, but the operative effect of such order had been stayed and suspended by an order of the California Supreme Court granted under the authorization for such stay contained in Section 68 of the California Public Utilities Act. (Appendix.)

This stay order legally authorized your petitioner to continue to collect seven cents, or one cent in excess of the rate imposed upon petitioner by the order of the California Railroad Commission. Hence, the entire fare collected was neither unlawful nor illegal so as to even warrant the suggestion that by reason of any illegality in the transaction petitioner did not gain title to the entire fare collected by it.

By the very nature of the transaction it was impossible for six cents out of each fare of seven cents to become the property of petitioner and one cent of each fare to remain the property of the passenger. The passenger necessarily paid the whole seven cents to petitioner who claimed the same as its property, duly earned by it as the consideration for the transportation furnished to the passenger. In compliance with the order of the Supreme Court your petitioner offered to each of its passengers

refund coupons as evidence of his payment of an excess fare so that if the Commission's order was upheld by the Courts, he might, if he chose, present claim against petitioner to recover the difference between the fare collected by the carrier and that fixed by the Railroad Commission.

From the time each fare came into the possession of your petitioner, the money became the property of petitioner, and it was responsible for the same. If the money was stolen, or if it was destroyed by fire, it would be the loss of the railway company, and such facts would not constitute a defense to the claim of a passenger for a refund of the excess fare if the order of the Commission should be sustained. Such loss would not affect the contingent claim or possible causes of action of its passengers any more than it would affect the claim or cause of action of any other creditor. After the decision of this Court affirming the judgment of the Supreme Court of the State of California, the contingent claim of each passenger ripened into a cause of action, and the relationship of debtor and creditor arose as between the company and its passengers.

By the order of the California Supreme Court of May 31, 1945, entitled "Order directing payment of excess fares impounded under prior order" (R. 164), it was provided that all applications for refunds must be made within six months from and after the publication of an advertisement once in four daily newspapers published in San Francisco, and that at the expiration of six months after the publication of the said advertisement in the newspapers all further claims should be barred. (R. 166.)

By the verified final report and supplemental petition of Market Street Railway Company it was shown that said advertisement had been published in four named daily newspapers on June 30, 1945. (R. 167.) Hence on January 1, 1946, all claims of passengers for refunds were barred under the limitation fixed by said Supreme Court.

The amount of excess fares remaining unclaimed by the persons or corporations paying the same in the hands of petitioner on that date was the sum of $693,780.51 (R. 168), and said sum is the property of petitioner free from any and all claims.

D. The judgment of the State Court is not authorized by any statute of the State of California.

It is provided in Section 67 of the Public Utilities Act of the State of California that:

> "No court of this state (except the Supreme Court *to the extent herein specified*) shall have jurisdiction to review, reverse, correct or annul any order or decision of the Commission *or to suspend or delay the execution or operation thereof,* or to enjoin, restrain or interfere with the Commission in the performance of its official duties; provided that the writ of mandamus shall lie from the Supreme Court to the Commission in all proper cases."

The portion which we have italicized above limits the power of the Supreme Court to suspend or delay the execution or operation of an order or decision of the Railroad Commission *to the extent specified in the act.* By Section 68 of the Public Utilities Act, which we have set forth in full in the appendix hereto, it is provided that

"during the pendency of such writ the Supreme Court *in the manner hereinafter provided* may, in its discretion, stay or suspend in whole or in part the operation of the Commission's order or decision."

The Legislature then proceeded to set forth in detail the exact manner in which the Supreme Court was authorized to stay or suspend the operation of the order of the Commission.

Section 68(b) of the Act provides that no order staying or suspending an order or decision of the Commission (except a temporary stay) may be made except upon notice, and if granted it is required that the order suspending the same shall contain a specific finding based upon evidence submitted to the Court and identified by reference thereto, that great or irreparable damage would otherwise result to petitioner and specifying the nature of the damage. The stay order of the Supreme Court, dated March 8, 1944, contains the findings required. (R. 115, 116.)

Section 68(d) of the Act provides that in case the order of the Commission is stayed the order of the Court shall not become effective until a suspending bond shall have first been executed and filed with and approved by the Court, payable to the people of the State of California and sufficient in amount and security *to insure the prompt payment by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the Commission and of all moneys which any person or corporation may be compelled to pay pending the review of the proceedings, for transportation*

in excess of the charge fixed by the order or decision of the Commission, in case said order or decision is sustained. The bond which was filed is in the words of the statute, and is unenforceable as to any other person, or for any other purpose.

The Court is further authorized by said Section 68(d) of the Act, in case it stays or suspends an order of the Commission in any matter affecting rates, in its discretion to direct the public utility to pay into Court from time to time, there to be impounded until the final decision of the case, under such conditions as the Court may prescribe, all sums of money which it may collect from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the order or decision of the Commission had not been suspended.

By Section 68(e) it is provided that in case the Supreme Court stays or suspends any order or decision *lowering any fare,* the Court shall require the public utility to keep such accounts, verified by oath, as may, in the judgment of the Court, suffice to show the amounts being charged or received by such public utility, pending the review, in excess of the charges allowed by the order or decision of the Commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the order of the Commission is upheld. The Court is further authorized to require from time to time the party petitioning for review to give additional security, or to increase said suspending bond, whenever in the opinion of the Court

the same may be necessary to insure the prompt payment of said damages and said overcharges. By the same section, 68(e), it is provided:

> "Upon the final decision by the Supreme Court, all moneys which the public utility may have collected, pending the appeal in excess of those authorized by the order or decision of the Commission, together with such interest as may be reasonable, shall be promptly paid *to the corporations or persons entitled thereto* in such manner and through such methods of distribution as may be prescribed by the Court, should the Commission order or decision be upheld."

It is clear that "the corporations or persons entitled thereto" are the corporations or persons who were compelled to pay the excess fare. The passengers who paid the excess fare were the only persons damaged by reason of the stay order; hence they were entitled to recover from your petitioner the amount of excess fare paid by them. All who presented timely claims have been paid.

It clearly appears from a consideration of Sections 67 and 68 of the California Public Utilities Act (appendix) that the California legislature did not impose any duty upon a public utility to pay over to the State of California any unrefunded excess charges, nor did it authorize the State Supreme Court in granting a stay to insert a provision therein requiring a utility to pay over such unrefunded excess charges to any person or corporation, private or municipal, as the said Court might arbitrarily select to be the recipient of its bounty.

The Legislature in the first part of Section 68 distinctly said that the Supreme Court "*in the manner hereinafter*

provided" may in its discretion stay the Commission's order. The Supreme Court had discretion whether to grant or deny a stay in the first instance. If it found the fact of irreparable damage required to be first found, it could hardly refuse a stay in the exercise of judicial discretion, but, if granted, the Court was bound to do so in the manner provided by the Legislature, and it was not authorized to insert additional conditions. The nature and purpose of the bond required is specifically defined. The Court is authorized to require the impounding of excess charges.

But nowhere in the Public Utilities Act, nor in any other statute of the State of California, is the Supreme Court authorized to take away from a utility unclaimed excess charges remaining after the utility has paid over to the corporations or persons the amounts charged them in excess of the rate ordered by the Railroad Commission, and give the same to a municipal or private corporation, or even to the State of California itself, as the Supreme Court evidently contemplated doing when it made its original stay order.

Prior to 1933, Section 68(d) of the Public Utilities Act provided that after a certain period of time had expired after the final decision of the Supreme Court, and after notice by publication, all moneys not claimed within three months after the publication of said notice should be paid by the public utility, under the direction of the Commission, into the state treasury for the benefit of the general fund.

In 1933 this section was amended so as to eliminate all reference to the disposition of unclaimed excess charges.

(1933 Statutes of California, Chapter 442, pp. 1157-1160.) The section was also amended to provide that "the Supreme Court *in the manner hereinafter provided* may, in its discretion, stay or suspend in whole or in part the operation of the Commission's order or decision." Section 68 of the Public Utilities Act, as amended in 1933, was in effect during all of the period with which we are concerned in this cause.

It is respectfully submitted that when petitioner refunded to the persons and corporations, who presented their claims for refund within the time allowed by the order of the California Supreme Court therefor, the amounts to which they were entitled, petitioner fully discharged its legal obligations as a debtor to its creditors. As to those of the passengers who failed to present their claims within the time allowed by the California Supreme Court, their rights as creditors were extinguished, and petitioner is entitled to retain all unclaimed excess charges.

Illinois Bell Telephone Co. v. Slattery, supra.

E. Unauthorized conditions in a statutory bond or stay order may be treated as surplusage.

The conditions in the stay order of the State Court that "the State shall be entitled to all such excess charges or moneys which petitioner has unsuccessfully attempted to refund, to be paid to it under such terms and conditions as the court may hereinafter prescribe" and that "Acceptance by petitioner of the benefits of the stay hereby ordered shall be deemed an acceptance of and con-

sent to the terms and conditions prescribed herein" were inserted therein by the Court on its own motion and over the vigorous protest of counsel for petitioner. (R. 158, 159.) Petitioner did not stipulate or consent to such conditions. Nevertheless, the Court, although it found that petitioner would sustain a loss of $3,000 per day in revenue unless the stay be granted, inserted these conditions which were not prescribed or authorized by Section 68 of the Public Utilities Act, and petitioner was coerced to operate under the stay as written or else its right to challenge the validity of the order reducing its fares would be meaningless.

It has often been held that in the case of statutory bonds or stay orders which contain provisions or conditions not required by the statute or contrary to the requirements thereof, the unauthorized or illegal provisions may be disregarded and treated as surplusage.

United States v. Gordon, 3 L. Ed. 347, 7 Cranch 287;

8 *American Jurisprudence,* p. 717;

11 *Corpus Juris Secundum,* p. 410.

F. The City and County of San Francisco is not a party in interest entitled to assert a claim to the unrefunded excess fares.

Since the California Legislature amended Section 68 of the Public Utilities Act in 1933, by striking out the provision for the payment of unclaimed excess charges to the state treasurer for the benefit of the general fund, as we have heretofore shown, there has been no legislation

purporting to authorize the California Supreme Court to award charges collected by a street railway corporation in excess of the rate established by the Railroad Commission to anyone *other than the corporations or persons actually paying the same.*

That section requires a bond and authorizes the impounding of excess charges for the express purpose of insuring the prompt payment by the utility of all excess charges which any person or corporation may be compelled to pay pending the review in the event the order is sustained. If the order of the Commission is sustained the excess charges are to be promptly paid to the corporation or persons paying the same. The statute does not require, or even contemplate, that such excess charges should be paid anyone else. The persons or corporations paying the excess charges are the only real parties in interest.

Mr. Justice Edmonds in dissenting from the decision of the California Supreme Court stated the rule that only the real party in interest may recover charges collected in excess of established rates, saying:

> "Furthermore, applying the common law rule that the real party in interest is the proper party to maintain an action for the recovery of excessive charges, it has been held that although a shipper, who occupies the same position as a passenger of Market Street Railway Company, may maintain an action to recover overcharges unlawfully exacted from him by a common carrier, *the state, and upon principle its subdivisions, including municipalities, have no right to recover on behalf of individual shippers the amounts paid by them in excess of established rates.* (*State v. Chicago & A. R. Co.*, 265 Mo. 646, 13 A.L.R.

299.) I would, therefore, exonerate the sureties on the bond of the Market Street Railway Company and direct the clerk of this court to deliver to the carrier the securities deposited by it pursuant to the stay order."

It has been many times held that the sovereign in its representative capacity has no implied power to demand a general accounting for the purpose of impounding funds collected in excess of that by law allowed for the benefit of individuals entitled thereto, because the state, through its public officials, should not so assist either party in a private controversy. *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U. S. 277; *People v. Albany S. R. R. Co.*, 57 N. Y. 164; *People v. Ingersoll*, 58 N. Y. 1, 17 Am. Rep. 178; *In re Benton*, 66 Vt. 507, 29 Atl. 805; *State ex rel. v. Dunbar*, 53 Ore. 45, 98 Pac. 878, 20 L.R.A. (N. S.) 1018.

In *Missouri, Kansas & Texas R. R. Co. v. No. Rd. etc. Comrs.*, 183 U. S. 53, Mr. Justice Brewer, delivering the opinion of the Court, said:

> "It is true that the state has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the state, as an organized political community, a party in interest in the litigation, for if that were so the state would be a party in interest in all litigation, because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the state, either statute or common. The interest must be one in the state as an artificial person."

As illustrative of our point that the City and County of San Francisco, a mere political subdivision of the state, has no pecuniary interest in the so-called impounded fund, we cite the case of *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, which was an action to restrain the enforcement by state officers of unjust and unreasonable rates fixed for carriers by state authority. To the point we quote:

> "Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the state, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of state officers under a constitutional statute is not subject to challenge in the Federal court. We are unable to yield our assent to this argument. *So far from the state being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the state can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property.* There is a sense, doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar

> will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not merely so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes and yet a frequent and unquestioned exercise of jurisdiction of courts, state and Federal, is in restraining the collection of taxes, illegal in whole or in part."

From the decisions of this Court and other courts, it is apparent that neither the State of California nor the City and County of San Francisco have any pecuniary interest in the impounded fund. There is no evidence in the record, nor has it ever been claimed by either the State or the City and County, that they, or either of them, ever paid to your petitioner one cent as a fare. Hence, the City and County of San Francisco is not a party in interest entitled under the Public Utilities Act to any part of the excess fares charged by your petitioner during the time the order of the Railroad Commission was stayed. The City and County of San Francisco was neither a party to the proceedings for a Writ of Review by the State Supreme Court, nor was it a party on the appeal in the main case to this Court.

G. The State Court erred in giving judgment against petitioner on an alleged obligation which had theretofore been released and discharged.

The Supreme Court of California based its decision in favor of the City and County of San Francisco upon the ground shown in the following extracts from its opinion:

"The City bases its claim for distribution to it of the unrefunded excess in part on its acquisition and operation of the properties of the railway company. The City refers to the greatly depleted and depreciated state of the properties, and to the condition of the roadbeds which alone necessitates the expenditure of over $1,600,000.00 to defray the cost of the repairs as to which the railway company was in arrears under its franchise at the time of sale and transfer."

"Equitable considerations dictate that the people of the City, who contributed the moneys and who now own and operate the properties which furnished the service when the excess fares were paid, are entitled to have them distributed for their benefit *in the rehabilitation of the physical properties which were acquired during the pendency of the review proceedings,* and for the improvement of the service afforded thereby. The distribution of the fund *in that manner and its application to the purpose specified will inure to the benefit of those whose payments accumulated the fund,* including both the people of the City and outsiders who have occasion to avail themselves of the service."

The effect of the consideration given by the State Court to the alleged depreciated value of the street railway system of your petitioner when it was purchased by the City and County of San Francisco, and the alleged default of your petitioner in its franchise obligations, in determining that said City and County was entitled to the excess fares remaining in the hands of your petitioner is to permit the City and County of San Francisco to recover upon an asserted liability and obligation which had been solemnly released by a written contract which discharged

your petitioner of and from any liability under its franchises or operating permit.

In the final report and supplemental petition filed by your petitioner after it had completed the refunding operations ordered by said Supreme Court, your petitioner alleged the terms of the sale agreement and set forth that at the time of the transfer of its properties it had been relieved of and from any and all obligations in connection with the said operative properties and relieved from any and all obligations to said City under or by virtue of the operating permit which it surrendered for cancellation or under any other franchises, permits or licenses granted by City to Company. (R. pp. 167, 169-170.) This contract provision was not considered by the State Court, and the decision impairs the obligation of said contract.

H. Conclusion.

In *Thompson v. Consolidated Gas Utilities Corporation*, 300 U. S. 55, this Court condemned, as violative of Section 1 of the 14th Amendment to the Constitution of the United States, an order of the Texas Railroad Commission which took the private property of the Consolidated Gas Utilities Corporation without compensation, and purported to give the same to the owners of approximately 180 gas wells. This Court there said:

> "Our law reports present no more glaring instance of the taking of one man's property and giving it to another."

Here the Supreme Court of the State of California has construed Section 68 of the California Public Utilities Act, which, in plain language, not susceptible of construction, interpretation or other legal device to change the meaning thereof clearly directs the payment by the utility of any charges or exactions held to be excessive to the persons or corporations paying the same, to authorize it to take petitioner's property and give it to a municipal corporation which has no interest in the property. The section recognizes that such persons or corporations are the only interested parties, and no provision is made for the payment of such excess charges, whether claimed or unclaimed, to anyone else.

It is respectfully submitted that the case at bar presents an even more glaring instance of the taking of the private property of a person and giving it to another.

WHEREFORE, it having been shown that this Court has jurisdiction to review the final order of the Supreme Court of the State of California under subsection (b) of Section 237 of the Judicial Code, as amended, and that said order, if carried out, will deprive petitioner of its property, to-wit, the sum of $688,751.58, without due process of law in violation of the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Chief Justice and the Associate Justices of the Supreme Court of the State of California, commanding them to certify and send to this Court the transcript of record in this case, to the end that

the order of said Court may be reviewed and reversed and that petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

Dated, San Francisco, California,
November 6, 1946.

MARKET STREET RAILWAY COMPANY
(a corporation),
Petitioner,
By CYRIL APPEL,
IVORES R. DAINS,
Counsel for Petitioner.

(Appendix Follows.)

Appendix

APPLICABLE PROVISIONS OF THE PUBLIC UTILITIES ACT OF THE STATE OF CALIFORNIA, 1933 STATUTES OF CALIFORNIA, CHAPTER 442, pp. 1157 TO 1160 INC.

Sec. 67. Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown the same be continued. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as hereinafter provided; such questions of fact shall include ultimate facts and the findings

and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure of this state relating to writs of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the Supreme Court under the provisions of this section. No court of this State (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the said constitutional question shall not be final.

Sec. 68. (a) The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of such writ the Supreme Court in the manner hereinafter

provided may, in its discretion, stay or suspend in whole or in part the operation of the commission's order or decision.

(b) No order so staying or suspending an order or decision of the commission shall be made by the Supreme Court otherwise than upon five days' notice and after hearing, and if the order or decision of the commission is stayed or suspended the order suspending the same shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to petitioner and specifying the nature of the damage; provided, however, that the Supreme Court may grant a temporary stay restraining the operation of the commission order or decision at any time before such hearing and determination of the application for a stay in the event it be of the opinion that irreparable loss or damage would result to petitioner unless such temporary stay be granted, but such temporary stay shall remain in force only until the hearing and determination of the application for a stay upon notice as aforesaid. The hearing of such application for a stay shall be given precedence and shall be expedited and assigned for hearing at the earliest practicable day after the expiration of notice hereinabove provided for.

(c) No temporary stay shall be granted by the Supreme Court unless it shall clearly appear from specific facts shown by the verified petition that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and hearing had

on a motion for a stay as hereinabove provided. Every such temporary stay shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it appears to be irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry not to exceed ten days as the court may fix unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary stay shall be granted without notice in the contingency specified the matter of the issuance of a stay shall be set down for hearing at the earlist possible time; and when the same comes up for hearing the party obtaining the temporary stay shall proceed with the application for a stay and if he does not do so the court shall dissolve the temporary stay.

(d) In case the order or decision of the commission is stayed or a temporary stay granted the order of the court shall not become effective until a suspending bond shall have first been executed and filed with and approved by the court, payable to the people of the State of California and sufficient in amount and security to insure the prompt payment by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission and of all moneys which any person or corporation may be compelled to pay pending the review of the proceedings, for transportation, transmission, product, commodity or service in excess of the charges fixed by the order or

decision of the commission, in case said order or decision is sustained. The court, in case it stays or suspends the order or decision of the commission in any matter affecting rates, fares, tolls, rentals, charges or classifications may also in its discretion direct the public utility affected to pay into court from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court may prescribe, all sums of money which it may collect from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the order or decision of the commission had not been stayed or suspended.

(e) In case the Supreme Court stays any order or decision denying to the utility an increase in any rate, fare, toll, rental, charge or classification, the court may condition such stay or temporary stay so as to permit petitioner to charge a higher rate pending the determination of the review and may attach such further conditions to such stay or temporary stay as may appear to be reasonable.

In case the Supreme Court stays or suspends any order or decision lowering any rate, fare, toll, rental, charge or classification or stays any order or decision denying petitioner the right to charge an increased rate, fare, toll, rental, charge or classification and as a condition thereof permits the charging of higher rates, the court shall require the public utility affected to keep such accounts, verified by oath as may, in the judgment of the court, suffice to show the amounts being charged or received by such public utility, pending the review, in excess of the charges allowed

by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the order or decision of the commission is upheld. The court may from time to time require said party petitioning for a review to give additional security, or to increase the said suspending bond, whenever in the opinion of the court the same may be necessary to insure the prompt payment of said damages and said overcharges. Upon the final decision by the Supreme Court, all moneys which the public utility may have collected, pending the appeal in excess of those authorized by the order or decision of the commission, together with such interest as may be reasonable, shall be promptly paid to the corporations or persons entitled thereto in such manner and through such methods of distribution as may be prescribed by the court, should the commission order or decision be upheld.